

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 4, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2015AP2572-CR**

**Cir. Ct. No. 2011CF4945**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CORDALE JUSTIN GILMORE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS J. FLYNN, Reserve Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Cordale J. Gilmore appeals a judgment convicting him of felon in possession of a firearm, as a repeater. He also appeals an order denying his postconviction motion without a hearing. Gilmore argues that: (1) he received ineffective assistance of trial counsel because his lawyer did not

challenge the stop and search of the car in which he was riding; (2) he received ineffective assistance of trial counsel because his lawyer did not challenge his admission to police that the gun was his; and (3) there was insufficient evidence presented at trial to show that he *possessed* the gun. We affirm.

¶2 Gilmore was a passenger in a car that the police pulled over and searched. They found a loaded gun under the back seat, directly below where Gilmore was sitting. After a trial to the court, Gilmore was found guilty of felon in possession of a firearm. Gilmore moved for postconviction relief, which was denied.

¶3 Gilmore first argues that he received ineffective assistance of counsel because his attorney should have challenged the stop and search of the car. A defendant claiming ineffective assistance of counsel must show both that his lawyer performed deficiently and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *Id.* at 697.

¶4 Police Officer Scott Freiburger testified that he was patrolling with his partner, Police Officer Joel Susler, and had just received a call about a burglary in the area when he saw a car that failed to stop for a stop sign. Officer Freiburger testified that they signaled for the car to stop, but it continued driving. He said that the rear passenger door was held open about twelve inches as the car slowly proceeded, which led Office Freiburger to believe that someone might attempt to jump out and flee. Officer Freiburger testified that they called for backup because the vehicle refused to stop. After the car finally stopped, Officer Freiburger testified that he and Officer Susler approached the car. He said that he had a

flashlight and drew his weapon because the windows of the car were heavily tinted and he saw movement, although he could not tell what was happening in the car due to the tinted windows. He explained that he was concerned that someone in the car might be retrieving a firearm. Officer Freiburger testified that Officer Susler directed the driver to exit the car while Officer Freiburger kept an eye on the passengers. After Officer Susler patted the driver down for weapons and placed him in the squad car, they removed the passengers from the automobile and searched it. Officer Freiburger testified that he found a loaded gun underneath the back seat on the passenger side, directly below where Gilmore had been sitting.

¶5 Officer Susler testified that he was driving the patrol car that stopped the car in which Gilmore was riding. He testified that the car went through a stop sign and the car initially refused to pull over after they activated their lights and siren. After the car stopped, Officer Susler testified that he saw movement through the tinted windows as he approached the car, but was not able to determine what was happening inside because he could see only shapes through the tinted glass. He testified that they removed the driver and passengers and Officer Freiburger searched the car. He did not participate in the search, but Officer Freiburger told him that a loaded firearm was found in the car.

¶6 A police officer may stop a vehicle if the officer has probable cause or a reasonable suspicion to believe that a crime or a traffic violation has occurred. *State v. Popke*, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569. Here, the police had probable cause to stop the car because they saw the driver fail to stop at a stop sign.

¶7 A police officer may search the passenger compartment of an automobile “if the police officer possesses a reasonable belief based on specific

and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.” *Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (citation and quotation marks omitted). Here, the driver was behaving erratically, failing to stop for a stop sign and failing to pull over when signaled to do so, and a passenger was holding the back door slightly ajar, as if to flee the police or throw something from the car. This suspicious activity caused the police to call for backup. The vehicle’s windows were tinted, obscuring the officers’ vision as they approached the car, and the police saw movement inside the car that they feared might be people in the car attempting to arm themselves.

¶8 Based on these circumstances, the police acted reasonably in searching the car because they believed that the people in the car might be dangerous and attempting to reach for weapons. A motion to suppress evidence found in the search would not have been successful. Therefore, we reject this claim that Gilmore received ineffective assistance of counsel. *See State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987) (a claim of ineffective assistance of counsel cannot be based on a defendant’s claim that his lawyer should have raised an argument that would not have been successful).

¶9 Gilmore next argues that he received ineffective assistance of counsel because his lawyer failed to challenge his admission to police that the gun was his. Assuming for the sake of argument that Gilmore’s statement to the police should have been suppressed, an issue we do not decide, Gilmore cannot show that he was prejudiced. *See Strickland*, 466 U.S. at 697 (a reviewing court may dispose of a claim of ineffective assistance of counsel if the defendant was not prejudiced by counsel’s allegedly deficient action). Undisputed trial testimony

established that Gilmore was the only passenger in the backseat of the car and the gun was found underneath the back seat, directly below where Gilmore was sitting. There is no reasonable probability that the circuit court would have concluded that Gilmore was not in possession of the gun even if his statement of ownership had not been admitted. We reject Gilmore’s argument that he received ineffective assistance of counsel because his lawyer did not move to suppress his statement.

¶10 Gilmore next argues that there was insufficient evidence to show that he possessed the gun. We will not overturn a verdict “[i]f any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt.” *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). “An item is ... in a person’s possession if it is in an area over which the person has control and the person intends to exercise control over the item.” WIS JI-CRIMINAL 1343 (2016). “It is not required that a person own an item in order to possess it.” *Id.* The officers’ trial testimony supports the circuit court’s reasonable inference, made in its role as trier of fact, that Gilmore “possessed” the firearm because the gun was underneath Gilmore’s seat, an area over which he had control as the sole backseat passenger. There was sufficient evidence to show that Gilmore possessed the gun.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

